

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE NO. 2008-118
Oilman's Truck Tanks, Inc.)	
)	
Materials Management Office)	POSTING DATE:
IFB No. 5400000241)	
Tanker Bodies for the)	JUNE 6, 2008
<u>Department of Education</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Oilman's Truck Tanks, Inc. (Oilman). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure truck tanker bodies for fuel tankers. In the letter, Oilman protested MMO's intent to award to Amthor International, Inc. (Amthor) alleging that MMO disregarded the stated award criteria in determining the award. Specifically, Oilman alleged that MMO did not factor in the award criterion that stated "In calculating the low bid, the price of your annual maintenance, less any included initial warranty period, will be considered."

As the issues to be decided are clear, this decision is prepared based upon and administrative review of the procurement file without the benefit of a hearing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On February 26, 2008, MMO issued the IFB.
2. On March 11, 2008, MMO issued Amendment #1.

3. On March 12, 2008, MMO issued Amendment #2.

4. On March 20, 2008, MMO opened the following bids:

<u>Bidder</u>	<u>Bid Amount</u>
Amthor	\$375,266
Oilman's	375,354

5. On March 28, 2008, after applying the resident vendor preference, Richard Brinkley, MMO Procurement Manager, posted a notice of intent to award to Oilman's.

6. On April 4, 2008, John Stevens, State Procurement Officer, submitted a written request to the CPO to cancel the intent after award, but prior to performance, due to an administrative error.

7. On May 5, 2008, the CPO posted a written determination cancelling the MMO intent to award to Oilman's due to an administrative error per S.C. Reg. 19-445.2085(C).

8. On May 7, 2008, MMO posted a new intent to award to Amthor.

9. On May 15, 2008, the CPO received Oilman's protest.

CONCLUSIONS OF LAW

Oilman's alleged that MMO failed to apply a specified award criterion on determining Amthor the lowest responsive bidder. Specifically, Oilman's alleged that MMO did not apply award criterion stating, "In calculating the low bid, the price of your annual maintenance, less any included initial warranty period, will be considered." [IFB, p. 14, Calculating the Low Bid]

MMO agrees; the statement under the heading of Calculating the Low Bid was placed in the IFB in error. But, MMO counters "there is no 'maintenance' included within the Scope of Work of the solicitation. Since the contractor has no contractual obligation to perform services outside the warranty period, no pricing for maintenance was either requested or considered."

Regarding award of an IFB, the consolidated Procurement Code reads, "notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the

requirements set forth in the invitation for bids must be given by posting the notice at a location specified in the invitation for bids.” [11-35-1520 (10)] Question is, what “requirements (were) set forth in the invitation for bids?”

In the description of the IFB, MMO wrote that it was soliciting bids to “Purchase Tanker Bodies.” [IFB cover page] The description does not mention maintenance services, as a requirement of the IFB. In the Scope of Solicitation section of the IFB, MMO wrote, “The purpose of this solicitation is to establish a source of supply for the purchase of new supplies and/or equipment as listed.” [IFB, p. 3, Acquire Supplies/Equipment] The scope of work does not obligate the bidders to provide any maintenance services. In the bidding schedule, MMO asked bidders to quote a price for “Fuel tanker bodies.” The bidding schedule did not mention maintenance, provide a location or a formula for bidders to calculate a price, or require bidders to bid “the price of your annual maintenance, less any included initial warranty period.” Regarding warranty, the IFB did require “Contractor warrants all items acquired shall conform to all contractor’s representations, the requirements of this contract, and all published documentation” [IFB, p. 21, Warranty – One Year], but did not specify a requirement for maintenance of the fuel tanker bodies.

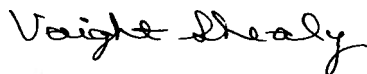
DETERMINATION

Regrettably, MMO confused the matter by misstating the criteria for calculating the low bid. However, the IFB did not obligate the contractor to provide maintenance on the tanker bodies in the scope of work, or provide a space, location or other means for bidders to offer a price for maintenance after the initial one-year warranty period. Neither bidder wrote in a price for maintenance on its bid. Therefore, maintenance pricing was not used in any way in the determination of the lowest responsive and responsible bidder. It simply did not affect the outcome; it did not matter.

After losing the award, Oilman attempts to protest the fact that the IFB stated a basis of determining the lowest bidder that was not provided for in the IFB. However, Oilman did not object, point out to MMO, or protest to the CPO that the solicitation was deficient in that it did not provide bidders a space, an opportunity, or formula for calculating a price for maintaining the fuel tanker bodies after the one-year warranty period. Finally, Oilman did not bid a price for maintaining its tanker bodies after the warranty expires.

Instead, Oilman attempts to create fictitious "what if" scenarios in an attempt to show that maintenance provided by Amthor would be more expense due to distance, familiarity or priority of service. Oilman's makes a weak attempt to assert that it would be the lowest bidder and asks the CPO to have faith that its assertion is valid. However, Oilman's provides no sustainable proof of its assertion; nothing that could be sustained by the preponderance of the evidence.

Therefore, for the reasons stated above, the protest is denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

June 6, 2008

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2007 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2007 S.C. Act No. 117, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).